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KN (a child) & Anor v Public Prosecutor

B HIGH COURT (JOHOR BAHRU) — CRIMINAL REVISION NO JA-43–32–10 OF 2021
SHAHNAZ SULAIMAN JC
26 OCTOBER 2021

C *Criminal Procedure — Revision — Sentence — Magistrate ordered child accused to pay RM5,000 fine for voluntarily causing hurt ('VCH') to another person — Magistrate invoked s 91(1)(d) of Child Act 2001 in ordering fine — Said section prescribed fine for all offences without specifying maximum amount — Section 323 of Penal Code specifically concerned offence of VCH and*
D *prescribed maximum fine of RM2,000 for offender — Whether although Child Act 2001 was specific law governing children and prevailed over general law in the Penal Code, Parliament could not have intended child offender to pay higher fine under s 91(1)(d) of Child Act 2001 than the amount an adult offender would be fined under s 323 of Penal Code — Whether both provisions had to be read*
E *together harmoniously to avoid an absurd result*

The magistrate's court had ordered the applicants, KN and UA — who were respectively 17 years and 16 years old at the time of the offence — to each pay a fine of RM5,000, in default six months' jail, after they pleaded guilty to a
F s 323 Penal Code charge of voluntarily causing hurt to another person. The magistrate passed the sentence after considering the Child Act 2001, a report from the Social Welfare Department concerning the applicants and the views of two advisors of the Children's Court. In the instant revision application, the applicants contended that the sentence was wrong because they were fined
G more than the maximum that was prescribed under s 323 of the Penal Code, which was only RM2,000.

Held, substituting the magistrate's sentence with a fine of RM1,000, in default one month's jail, for each of the applicants

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(1) In the instant case, the magistrate had sentenced the applicants in accordance with s 91(1)(d) of the Child Act 2001 which enabled the court to 'order the child to pay a fine, compensation or costs'. That provision did not specify the maximum amount of fine (see paras 23–22 & 34).

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(2) Since an adult convicted under s 323 of the Penal Code was punishable with a maximum one year's jail term or a maximum fine of RM2,000 or both, Parliament could not have intended a child offender to pay a much bigger fine than an adult for the same offence (see paras 35–37).

(3) Although the Child Act 2001 was the specific legislation that governed the applicants and prevailed over the Penal Code, which was of a general nature, the former could not stand independently when it came to the sentencing of the applicants. Section 323 had to be read harmoniously with s 91(1)(d) of the Child Act 2001 because the latter provided for fines for all offences and therefore did not have a cap or limit to the fine. Section 323 of the Penal Code, on the other hand, provided the sentence for the specific offence of voluntarily causing hurt. Therefore, to avoid an absurd result, the provisions had to be read together harmoniously and a child found guilty under s 323 of the Penal Code should not be ordered to pay a fine more than RM2,000 even though s 91(1)(d) of the Child Act 2001 was invoked when imposing the fine (see paras 30–31 & 37–38).

[Bahasa Malaysia summary

Mahkamah majistret telah memerintahkan pemohon, KN dan UA — masing-masing berusia 17 tahun dan 16 tahun pada masa kesalahan — masing-masing bagi membayar denda RM5,000, atau penjara enam bulan sekiranya ingkar, selepas mereka mengaku bersalah kepada pertuduhan s 323 Kanun Keseksaan denga menyebabkan kecederaan kepada orang lain secara sengaja. Majistret menjatuhkan hukuman tersebut selepas menimbangkan Akta Kanak-Kanak 2001, laporan Jabatan Kebajikan Masyarakat berkaitan pemohon dan pandangan dua penasihat Mahkamah Kanak-Kanak. Dalam permohonan semakan semasa, pemohon berpendapat bahawa hukuman tersebut salah kerana mereka didenda melebihi denda maksimum yang ditetapkan di bawah s 323 Kanun Keseksaan, iaitu hanya RM2,000.

Diputuskan, menggantikan hukuman majistret dengan denda RM1,000, sekiranya gagal penjara sebulan, bagi setiap pemohon

(1) Dalam kes semasa, majistret telah menjatuhkan hukuman kepada pemohon mengikut s 91(1)(d) Akta Kanak-Kanak 2001 yang membolehkan mahkamah 'memerintahkan supaya kanak-kanak itu membayar denda, pampasan atau kos'. Peruntukan tersebut tidak menyatakan jumlah maksimum denda (lihat perenggan 23–22 & 34).

(2) Memandangkan orang dewasa yang disabitkan kesalahan di bawah s 323 Kanun Keseksaan boleh dihukum dengan hukuman penjara maksimum setahun atau denda maksimum RM2,000 atau kedua-duanya, Parlimen tidak boleh bermaksud bahawa pesalah kanak-kanak membayar denda yang lebih besar daripada denda orang dewasa untuk kesalahan yang sama (lihat perenggan 35–37).

(3) Walaupun Akta Kanak-Kanak 2001 adalah perundangan khusus yang mengawal pemohon dan melangkaui Kanun Keseksaan, yang bersifat umum, yang pertama tidak boleh berdiri sendiri apabila ia melibatkan hukuman ke atas pemohon. Seksyen 323 harus dibaca secara harmoni

dengan s 91(1)(d) Akta Kanak-Kanak 2001 kerana s 91(1)(d) Akta Kanak-Kanak 2001 memperuntukkan denda bagi semua kesalahan dan oleh itu tidak mempunyai siling atau had kepada denda. Seksyen 323 Kanun Keseksaan pula memperuntukkan hukuman bagi kesalahan khusus menyebabkan kecederaan secara sengaja. Oleh itu, untuk mengelakkan keputusan yang tidak masuk akal, peruntukan tersebut perlu dibaca bersama-sama secara harmoni dan kanak-kanak yang didapati bersalah di bawah s 323 Kanun Keseksaan tidak boleh diarah membayar denda melebihi RM2,000 walaupun s 91(1)(d) Akta Kanak-Kanak 2001 diguna pakai apabila mengenakan denda (lihat perenggan 30–31 & 37–38).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (refd)
Hari Ram Seghal v PP [1981] 1 MLJ 165 (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69; [1987] 1 CLJ 35, SC (refd)
PP v Muhari bin Mohd Jani & Anor [1996] 3 MLJ 116, HC (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)
Suresh Kumar a/l Velayuthan v PP [2020] 10 MLJ 549; [2020] 4 CLJ 270, HC (refd)

Legislation referred to

Child Act 2001 ss 2, 91(1), (1)(d)
Criminal Procedure Code s 323
Criminal Procedure Code 1973 [IN] s 397
Criminal Procedure Code 2010 [SG] s 400
Penal Code s 323

Vinodharan Mohan (Vinod & How) for the applicant.
Bharathy a/p Balakrishnan (Deputy Public Prosecutor, Johor State Legal Advisor's Office) for the respondent.

Shahnaz Sulaiman JC:

[1] This is an application for revision on the order imposed by the learned magistrate in Johor Bahru, Johor on 12 October 2021.

BACKGROUND

[2] The applicants were both charged in the court for children on 22 April 2021 for an offence under s 323 of the Penal Code.

[3] The charge proffered against the applicants read as follows:

Bahawa kamu bersama-sama pada 08.04.2021 jam lebih kurang 06.20 petang di lorong belakang berhadapan SMK Tun Fatimah Hashim, Jalan Nibong 48, Taman Daya, di dalam daerah Johor Bahru Selatan, di dalam Negeri Johor dengan sengaja mendatangkan kecederaan ke atas lelaki bernama Thirunesh A/L Balasubramaniam (K/P: 061218-02-1015) dengan menampar di bahagian muka oleh yang demikian kamu telah melakukan satu kesalahan dan boleh dihukum di bawah seksyen 323 Kanun Keseksaan dibacakan bersama dengan seksyen 34 Kanun Keseksaan.

Hukuman: Dipenjarakan selama tempoh setahun atau dengan denda sampai dua ribu Ringgit, atau dengan kedua-duanya.

[4] The charge was read out and explained to the applicants. Both the applicants understood the charge and pleaded guilty to the said charge. Upon being satisfied that the applicants understood the nature and consequences of their unconditional plea of guilty, the learned magistrate found both applicants guilty.

[5] Having heard the applicants' mitigation factors and the submission by the learned deputy public prosecutor, the report from the Social Welfare Officer and the advice from the two advisors of the court of children, the learned magistrate proceeded to order each applicant with a fine of RM5,000 to be paid by their parents, in default of which to six months imprisonment.

THE LAW RELATING TO REVISION

[6] In relation to revision, s 323 of the Criminal Procedure Code provides as follows:

Section 323 Power to call for records of subordinate Courts.

(1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.

(2) Orders made under sections 97 and 98 are not proceedings within the meaning of this section.

[7] Section 323 of the Criminal Procedure Code corresponds with s 397 of the Indian Criminal Procedure Code 1973 and with s 400 of the Singapore Criminal Procedure Code 2010. This provision provides the High Court a supervisionary jurisdiction in order to correct a miscarriage of justice.

[8] In *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] 1 CLJ 35 the court held:

A We would observe that the power of revision is to be exercised in accordance with the law for the time being in force relating to criminal procedure. In the present case that law is the Criminal Procedure Code. We would also observe that the object of the revisionary powers provided for in the Code is:

B > ... to *confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment*, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other had, in some undeserved hardship to individuals. (Emphasis added.)

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[9] In *Hari Ram Seghal v Public Prosecutor* [1981] 1 MLJ 165 the court stated the following in relation to revisionary powers of the court:

D > The object of these provisions is to *correct any miscarriage of justice arising not only from error in judgment and procedure but from neglect or indolence on the part of those in authority and resulting in underserved hardship on any individual* affected by such judgment, neglect or indolence. (Emphasis added.)

[10] What is the scope of an application for revision? *Mallal's Criminal* E *Procedure* (8th Ed) at p 644 sheds light as reproduced below:

> The powers of the High Court acting in revision are wider in scope than its powers on appeal. The revisional provisions in the CPC are applicable in a criminal or quasi-criminal cause or matter only, and have no concern with matters that are purely civil in nature. The proceedings of all subordinate courts fall within the scope F of the revisionary jurisdiction, including bail proceedings. Juvenile proceedings and the record of coroner's inquiries are also amenable to revision. Findings, convictions, sentences and orders from which no appeal lies to the High Court are capable of revision. The High Court may use the power of revision to increase a sentence in exceptional cases. The High Court may act in revision even when the record of proceedings is not available.

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[11] The High Court may exercise its revisionary power in three ways. First is by *suo moto* or on its own motion. This power is exercised when the High Court becomes aware of irregularities or illegalities in the proceedings in the H subordinate court. Secondly, is by way of a formal application by either the accused or the public prosecutor. The third manner is by way of a formal or informal application by a person who is not a party to the proceedings, such as a victim of the crime.

I **[12]** In this regard, this court alluded to the case of *Public Prosecutor v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116 where KC Vohrah J stated:

> There are many ways in which the attention of the High Court judge may be drawn to cases where decisions made in the subordinate courts may have to be revised; *through newspaper reports of cases, through letters by members of the public or by*

aggrieved parties or by their relatives, through requests by magistrates or judges of the sessions court for revision of the decisions they had made; and through formal applications like the one filed by the brother of the deceased. (Emphasis added.)

[13] In this case, the application for revision was formally made by learned counsel on behalf of both the applicants.

THE APPLICANTS' SUBMISSIONS

[14] Learned counsel for the applicant informed the court that this revision application was in respect of the order given by the learned magistrate in Johor Bahru on 12 October 2021.

[15] The main contention in this application for revision is the order for the applicants' parents to pay a fine of RM5,000, in default of which to six months imprisonment. Learned counsel for the applicants submitted that, the applicants had pleaded guilty to a charge pursuant to s 323 of the Penal Code.

[16] Section 323 of the Penal Code provides a sentence of imprisonment for a term which may extend to one year or with fine which may extend to two thousand Ringgit or with both. It was contended by learned counsel for the applicants that the fine imposed by the learned magistrate in the Court of Children should not exceed the maximum fine of two thousand Ringgit provided for under s 323 of the Penal Code.

[17] To support his argument, learned counsel made reference to the case of *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151 and the *maxim generalia specialibus non derogant.*

THE RESPONDENT'S SUBMISSIONS

[18] The learned deputy public prosecutor, Puan Bharathy Balakrishnan argued that *maxim generalia specialibus non derogant* did not apply in this case as the Child Act 2001 is a specific law whilst the Penal Code is a general law. Puan Bharathy went on to state that the learned magistrate had imposed a fine as per the proposal of the Social Welfare Officer in accordance with the Child Act 2001.

[19] Moreover as s 323 of the Penal Code did not provide a maximum amount for the fine, it was argued that the learned magistrate had not erred when she imposed a fine of RM5,000 in default of which six months imprisonment.

A ANALYSIS

[20] This court will now proceed to consider this revision application. In this case, the first applicant and second applicant were aged 17 years one month and 16 years four months respectively at the time of the incident. In this regard, s 2 of the Child Act 2001 defines a child as:

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> 'child' —
>
> (a) means a person under the age of eighteen years; and
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> C (b) in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code [Act 574];

[21] Based on the definition of child as per the Child Act 2001, this court D finds both the applicants to be children within the definition of child. Accordingly, this matter was heard in the Court for Children. During the hearing, both the applicants pleaded guilty to the offence under s 323 of the Penal Code as stated in the charge against them.

E **[22]** Having being satisfied that both the applicants had pleaded guilty, it followed that the learned magistrate could make an order pursuant to sub-s 91(1) of the Child Act 2001. For ease of reference, sub-s 91(1) of the Child Act 2001 is reproduced below:

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> Section 91 Powers of Court For Children on proof of offence.
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> (1) If a Court For Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercisable by virtue of this Act, have power to —
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> (a) admonish and discharge the child;
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> G (b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;
>
> (c) order the child to be placed in the care of a relative or other fit and proper person —
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> H (i) for such period to be specified by the Court; and
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> (ii) with such conditions as may be imposed by the Court;
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> (d) *order the child to pay a fine, compensation or costs*;
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> (da) make a community service order; [Ins Act A1511]
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> I (e) make a probation order under section 98;
>
> (f) order the child to be sent to an approved school or a Henry Gurney School;
>
> (g) [Del Act A1511]

(h) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2), any term of imprisonment which could be awarded by a Sessions Court. (Emphasis added.)

[23] In this instant application, the learned magistrate gave an order in accordance with the provision of para 91(1)(d) of the Child Act 2001.

[24] The question before this court therefore is whether the order for a fine of RM5,000 for an offence under s 323 of the Penal Code which carries a maximum fine of RM2,000 is proper?

[25] Learned counsel Mr Vinod argued the maxim *generalia specialibus non derogant* would apply in this instance. Before this court proceeds to consider this argument, it would be prudent to consider what the maxim *generalia specialibus non derogant* encompasses.

[26] According to Latin Words & Phrases for Lawyers, *generalia specialibus non derogant* is Latin for general things (or words) do not derogate from specific things (or words). In the case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) stated:

Generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law.

[27] More recently, in *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151, Tengku Maimun Tuan Mat CJ said the following:

[53] Furthermore, the DDA is a specific Act relating to and dealing with trials in respect of dangerous drugs. The CPC, on the other hand, is a law of general application. *Where there is a conflict between a specific law and a general law, the conflict may be resolved in one of two ways. The first is via the maxim generalia specialibus non derogant. The second is the doctrine of harmonious construction.* (Emphasis added.)

[28] The maxim was alluded to by Collin Sequerah J in *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549; [2020] 4 CLJ 270 where His Lordship stated:

The reason that the principle of the maxim, '*generalia specialibus non derogant' is alluded to here is to emphasise that there are certain specific pieces of legislation designed to prevail over the more general provisions of law and these must be given full effect and the maxim must not be ignored as mere surplusage*. (Emphasis added.)

[29] On the application of the maxim *generalia specialibus non derogant,* this

court made reference to *Bindra's Interpretation of Statutes* (10th Ed) at p 649 as follows:

> *General words do not derogate from special provisions, or, special provisions will control general provisions*. In *Fitzgerald v Champneys,* Wood VC said:
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> > In passing the special Act, the legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and, having, so done, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated.
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> *When the legislature has given its attention to a separate subject, and made provisions for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly*. Each enactment must be construed in that respect according to its own subject-matter and its own terms. (Emphasis added.)

[30] In sum, the maxim *generalia specialibus non derogant* requires specific legislation to prevail over legislation of a general nature. Applying this maxim to the current revision application, this court is of the view that it is the Child Act 2001 which is a specific legislation, as the long title specifies:

> An Act to consolidate and amend the laws relating to the care, protection and rehabilitation of *children* and to provide for matters connected therewith and incidental thereto. (Emphasis added.)

[31] Respectfully, in this application where both applicants are children, this court cannot agree with learned counsel Mr Vinod's contention that the Penal Code is the specific law which will prevail over the provisions of the Child Act 2001.

[32] However, does this therefore mean than the order imposed by the learned magistrate of a fine of RM5,000 is proper when the maximum fine for an offence under s 323 of the Penal Code is RM2,000?

[33] Section 323 of the Penal Code provides for a maximum fine of RM2,000, while para 91(1)(d) of the Child Act 2001 allows the learned magistrate to impose a fine. Paragraph 91(1)(d) of the Child Act 2001, does not however accord a maximum amount that may be imposed.

[34] As para 91(1)(d) of the Child Act 2001 does not provide a maximum amount for a fine, does this mean a magistrate may impose a fine willy nilly?

[35] An adult convicted under s 323 of the Penal Code shall be punished with imprisonment for a term which may extend to one year or with fine which

may extend to two thousand Ringgit or with both. Would it make sense for a child to be ordered to pay a fine of more than two thousand Ringgit for the same offence?

[36] With the risk of repetition, the long title of the Child Act 2001 stated that it is an Act to provide for matters connected and incidental to the care, protection and rehabilitation of children. In light of this long title, would the Legislature have intended for a child to pay a heftier fine than an adult for the same offence?

[37] It is the humble of view of this court that this cannot be the intention of Parliament. Although Child Act 2001 is the specific legislation in this revision application, however it cannot stand independently when it comes to the sentencing of the applicants for an offence committed under s 323 of the Penal Code. Instead, the court opines that s 323 of the Penal Code and para 91(1)(d) of the Child Act 2001 should be read harmoniously.

[38] This is because this court is of the view that para 91(1)(d) of the Child Act 2001 provides for fines for all offences and therefore does not have a cap or limit to the fine. Section 323 of the Penal Code on the other hand provides for the sentence of the specific offence. Therefore, to avoid an absurd result the provisions should be read together harmoniously. For this reason, this court is of the humble view that a child found guilty under s 323 of the Penal Code should not be ordered to pay a fine more than two thousand Ringgit even though the learned magistrate had invoked para 91(1)(d) of the Child Act 2001 when imposing the fine on the applicants.

CONCLUSION

[39] For the abovemention reasons, this court set aside the fine imposed by the learned magistrate of RM5,000, in default of which to six months imprisonment.

[40] This court substituted the order of the learned magistrate with a fine of RM1,000, in default of which to one month imprisonment for each applicant.

Order accordingly.

Reported by Ashok Kumar